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In the Supreme Court of the United States

OCTOBER TERM, 1996

GARTH CONLAN,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, AND AGRICULTURAL PRODUCERS IN SUPPORT OF PETITIONER

NANCY N. MCDONOUGH
COUNSEL OF RECORD
CARL G. BORDEN
1601 Exposition Boulevard, FB3
Sacramento, California 95815
Telephone: (916) 924-4035
Attorneys for Amici Curiae

16 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF THE BRIEF *AMICI CURIAE* 6

STATEMENT OF THE CASE 6

ARGUMENT 8

I. CONGRESS DID NOT INTEND TO HOLD AN OWNER OR CONTROLLER OF LAND OR A FACILITY LIABLE FOR MSPA HOUSING VIOLATIONS WHERE HE IS UNAWARE THAT MIGRANT AGRICULTURAL WORKERS ARE BEING HOUSED ON IT. 8

II. A KNOWLEDGE REQUIREMENT WOULD STILL ALLOW CASES OF SO-CALLED "BENIGN NEGLECT" TO BE PROSECUTED . 11

III. IMPOSING LIABILITY FOR MSPA HOUSING VIOLATIONS ON THE OWNER OR CONTROLLER OF LAND ON WHICH MIGRANT AGRICULTURAL WORKERS ARE RESIDING WITHOUT HIS KNOWLEDGE VIOLATES NOTIONS OF FUNDAMENTAL FAIRNESS AND SUBSTANTIVE DUE PROCESS OF LAW. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Conlan v. U.S. Dept. Of Labor, 76 F.3d 271 (9th Cir. 1996) 7-9

Dobkin v. Chapman, 269 N.Y.S.2d 49, 25 A.D.2d 745 (1966), *aff'd*, 236 N.E.2d 451, 21 N.Y.2d 490, 289 N.Y.S.2d 161 13

Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954) 12

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) 12

Constitution

Fifth Amendment to the United States Constitution 5, 15

Statutes

Farm Labor Contractor Registration Act of 1963, *formerly at* 7 U.S.C. Section 2041 5

28 U.S.C. Section 2412(d) 7

Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. Section 1801, *et seq.* 2-6, 9-13

29 U.S.C. Section 1823(a), *et seq.* 8, 9

Other Authorities

H.R. REPORT NO. 97-885, 97th Cong., 2nd Sess. 1, reprinted in [1982] U.S. CODE CONG. & AD. NEWS 4547 ... 9, 10

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Pursuant to written consent granted by Petitioner Garth Conlan ("Conlan") and Respondent United States Department of Labor ("DOL") and filed herewith, *amici curiae* California Farm Bureau Federation, American Farm Bureau Federation, National Council of Agricultural Employers, and Agricultural Producers respectfully file this brief in support of Conlan's position.

INTEREST OF *AMICI CURIAE*

I. In General

This issue presented herein is one of first impression. The outcome of this case will affect not only Conlan but potentially everyone who owns or controls land in the nation.

The imposition of liability on a landowner or land controller for housing violations under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1801 *et seq.*--regardless of his knowledge that migrant agricultural workers are residing on his property--greatly concerns *amici curiae*. The members of *amici curiae* face a higher probability of being prosecuted for these types of violations than do other land owners and controllers in the nation at large. This is because the land owned or controlled by their members is located almost exclusively in rural agricultural areas--land on which migrant agricultural workers are most likely to live.

Many members *of amici curiae* are rural land owners or controllers who either lease or sublease their property to others or hire firms to manage their property; at least some of these lessees, sublessees and land-management firms likely allow migrant agricultural workers to reside on that property without the consent or knowledge of the land owner or controller. The outcome of the issue in the instant case will thus significantly affect the members of *amici curiae*.

II. California Farm Bureau Federation (CFBF)

CFBF is a nongovernmental, nonprofit California corporation. Its primary purpose is to represent, protect and advance the economic and social interests of California's farmers and ranchers. Its members are 53 county Farm Bureaus with a combined voluntary membership of more than 70,000 families. Over 80% of all commercial farmers in California are members of county Farm Bureaus.

CFBF is a member of co-*amicus curiae* American Farm Bureau Federation (AFBF). With input from several of its state Farm Bureau members, including CFBF, AFBF participated in the negotiations on and the drafting of the bill that became the MSPA, a section of which is the subject of this litigation.

Given its involvement through AFBF in the drafting of the MSPA, CFBF is very concerned about interpretations of the MSPA's provisions, especially--as in this case--where they are contrary to both its understanding of how the law should be interpreted and the best interests of California's farmers and ranchers. CFBF thus desires to express to the Court its views in this case, as it did to the DOL Administrative Law Judge (ALJ) who first heard the case and to the two reviewing courts below.

III. American Farm Bureau Federation (AFBF)

AFBF is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF has its principal offices at Park Ridge, Illinois.

AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations (including CFBF) in all 50 states and Puerto Rico, representing more than four million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

As noted in section II, *supra*, AFBF participated in the negotiations on and the drafting of the bill that became the MSPA. AFBF thus wants to ensure that the MSPA's provisions are interpreted appropriately and enforced fairly by expressing its views through this brief, as it did by joining the *amici curiae* herein in a brief filed with the court below.

IV. National Council of Agricultural Employers (NCAE)

NCAE is a national association based in Washington, D.C. NCAE represents growers and agricultural organizations on agricultural labor and employment issues. NCAE's membership includes agricultural employers in all 50 states who hire about 75 percent of the national agricultural workforce. Its members include farm cooperatives, growers, packers, processors and agricultural associations.

Its experience in representing agricultural employers gives NCAE the appropriate background to provide meaningful comments and insight into issues concerning worker and management relations in the agricultural industry.

NCAE seeks enforcement of the MSPA's provisions in a way that not only furthers its purposes but also ensures basic fairness

and due process to owners and controllers of agricultural property. NCAE joined the other *amici curiae* herein in filing a brief with the court below. NCAE seeks reversal of the holding of the court below that is being appealed herein because it adopts an interpretation of the MSPA that ignores the day-to-day realities of farming operations and would result in manifest injustice to many of NCAE's members without furthering the interests of farm workers that the MSPA seeks to protect.

V. Agricultural Producers (AP)

AP is a nonprofit trade association which represents growers and packers of citrus and other agricultural commodities in California and Arizona in industrial relations matters. AP is a member of co-*amicus curiae* NCAE.

AP, on its own and through NCAE, participated in the drafting of and negotiations on the language of the bill which eventually became the MSPA. AP also participated in the drafting and negotiations on the language of the MSPA's predecessor statute, the Farm Labor Contractor Registration Act of 1963, formerly at 7 U.S.C. § 2041 *et seq*. AP joined in briefs *amici curiae* filed with the two courts below in this case.

AP represents packinghouses and individual growers that hire migrant and seasonal agricultural workers, which therefore are subject to the MSPA. Because of its involvement in the drafting of the MSPA and its representation of agricultural entities that will be affected by the outcome of this case, AP desires to present to the Court its views on key issues herein.

SUMMARY OF THE BRIEF *AMICI CURIAE*

The MSPA imposes on a person who owns or controls a facility or real property used as housing for migrant agricultural workers responsibility for ensuring that the facility or real property complies with applicable safety and health standards.

The brief argues that such responsibility should attach to such a person only where *that person* provides the facility or real property to such workers for their use as housing or at least knows of such use.

In other words, liability should not attach to such a person where, for example, that person's lessee or sublessee allows workers to be housed in such a facility or on such real property without that person's knowledge.

To impose liability on such a person without his knowledge that the facility or real property is being used to house such workers contravenes the intent of Congress in enacting the MSPA as gleaned from its legislative history and offends fundamental notions of fairness and substantive due process.

STATEMENT OF THE CASE

In 1988, DOL officials raided real property owned by Conlan in Monterey County, California. The DOL assessed him over $25,000 for violating many worker housing standards under the MSPA. Conlan contested the assessment.

Conlan did not farm his property when it was raided. Rather, he leased it to tenant farmers. Employees of at least one tenant farmer were encamped on the property without Conlan's permission or even knowledge.

Further, Conlan leased to one tenant farmer a duplex which was to be used only by that tenant farmer. That tenant farmer, however, let some of his employees occupy the duplex--not only without Conlan's permission or knowledge but contrary to his express injunction not to do so.

A DOL ALJ heard the case in 1992. In 1993, the ALJ issued his ruling against Conlan as to both the encampment and the duplex, ordering him to pay to the DOL a civil penalty of $23,250.

Conlan appealed therefrom to the United States District Court, Northern District of California (San Jose). That court in 1994 issued its order affirming the ALJ's decision in its entirety.

Conlan appealed therefrom to the United States Court of Appeals for the Ninth Circuit. In February 1996, that court issued its opinion, *Conlan v. U.S. Dept. Of Labor, 76 F.3d 271 (9th Cir. 1996),* reversing the lower court's holding that Conlan was liable for violations pertaining to the encampment and affirming the holding that Conlan was liable for violations pertaining to the duplex. Conlan sought but was denied rehearing on the duplex issue. On July 1, 1996, he filed with this Court his Petition for Writ of Certiorari on the duplex issue.

On July 9, 1996, the Ninth Circuit Court of Appeals, holding that "[t]he DOL's underlying conduct and its litigation position were not substantially justified" with respect to the encampment issue, granted Conlan's application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

ARGUMENT

I

CONGRESS DID NOT INTEND TO HOLD AN OWNER OR CONTROLLER OF LAND OR A FACILITY LIABLE FOR MSPA HOUSING VIOLATIONS WHERE HE IS UNAWARE THAT MIGRANT AGRICULTURAL WORKERS ARE BEING HOUSED ON IT.

§ 203(a) of the MSPA, 29 U.S.C. § 1823(a), states:

> [E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

In its opinion the court below held that 29 U.S.C. § 1823(a) contains no scienter requirement, *i.e.*, that a person who owns or controls land or a facility may be held liable for violating § 1823(a) even if the person does not know it is being used as housing for migrant agricultural workers. *Conlan, supra at 274.*

Despite this, the court below held that

> the housing must be provided to the migrant agricultural workers by someone other than themselves. The owner of the facility or property need not use it to house the workers, but someone in control of the facility or property must.

Id. at 275.

Relying on these principles, the court below distinguished between the encampment and duplex situations. As to the encampment, no evidence showed "that anybody other than the migrant workers themselves provided the housing in which they lived." Yet Conlan, the landowner, was held liable for the duplex because his lessee had housed migrant agricultural workers there. *Id.*

Amici curiae agree with the holding of the court below that someone in control of the facility or property other than the workers themselves must use it to house them for § 1823(a) liability to be triggered. But unfortunately, the court below erred by not going further. The holding of the court below in affirming Conlan's liability for violations pertaining to the duplex not only unfairly penalizes him in this case, but also forces every owner or controller of land in the nation--farmer or otherwise--who leases or subleases it to another to patrol constantly their properties to ensure that no migrant agricultural worker is being housed thereon by the lessee or sublessee for even the briefest time. Otherwise, the land owner or controller could be prosecuted for MSPA violations. This fundamentally unfair result could not be what Congress intended in passing the MSPA.

As its legislative history notes, the MSPA was a consensus bill. H.R. REPORT NO. 97-885, 97th Cong., 2nd Sess. 1, reprinted in [1982] U.S. CODE CONG. & AD. NEWS 4547, 4547. It is inconceivable that organizations representing grower interests would have agreed to the MSPA had they suspected that one could be held liable for MSPA housing violations without even

knowing migrant agricultural workers are being housed on land he owns or controls.

It is just as inconceivable that Members of Congress who voted for the consensus bill would have done so had they believed it would impose strict liability for housing violations; some Members themselves perhaps owned and leased to others rural property on which their lessees might allow migrant agricultural workers to reside without the Members' knowledge, thereby creating liability for themselves.

The MSPA's legislative history shows that Congress intended to impose the law's housing requirements only on a land owner or controller who has at least some involvement in providing housing to migrant agricultural workers. That involvement--ranging in degree in a variety of circumstances from the active construction, maintenance and offering of housing to workers to a passive failure to eject workers encamping on the property within a reasonable period of time after he has discovered them there--by necessity requires that the land owner or controller at least know about the situation.

The House Committee report states: "The Committee intends this section be interpreted with the broadest possible meaning to ensure *the person who owns or controls the facility used as housing* for migrant agricultural workers and their families *is responsible for maintaining that facility* . . . ." (Emphasis added.) H.R. Report No. 97-885, *supra at 17*. The only reasonable reading of this sentence is to imply from it congressional intent that one at least know a facility or land owned or controlled by him is being used to house workers for

liability to attach; if one does not know that housing covered by the statute is occurring on his land, he should not be held responsible for "maintaining" it.

At the same time, the MSPA's policy objectives can be met by imposing responsibility and liability where it belongs: on the "land controller" (*e.g.*, lessee, sublessee or land-management firm) who allows migrant farm workers to occupy the land or facility.

II

A KNOWLEDGE REQUIREMENT WOULD STILL ALLOW CASES OF SO-CALLED "BENIGN NEGLECT" TO BE PROSECUTED.

Construing the MSPA to require knowledge by an owner of land that his lessee is housing migrant agricultural workers on it as an element of a violation of its housing provisions would still allow the DOL to enforce its provisions in those instances of "benign neglect" where the owner knows the workers are living on his land but takes no steps to remove them from it--either directly or by pressuring his lessee to do so.

A reasonable enforcement approach and interpretation of the MSPA would allow the landowner or land controller a reasonable period of time after having discovered that migrant agricultural workers are being housed on his property to act either to ensure that the housing complies with applicable safety and health standards or to seek their ejection from it.

III

IMPOSING LIABILITY FOR MSPA HOUSING VIOLATIONS ON THE OWNER OR CONTROLLER OF LAND ON WHICH MIGRANT AGRICULTURAL WORKERS ARE RESIDING WITHOUT HIS KNOWLEDGE VIOLATES NOTIONS OF FUNDAMENTAL FAIRNESS AND SUBSTANTIVE DUE PROCESS OF LAW.

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

This provision prohibits arbitrary or unreasonable legislation and government agency action. *Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934).* Due process bars Congress from enactments that shock the sense of fair play. *Galvan v. Press, 347 U.S. 522, 530, 74 S.Ct. 737, 98 L.Ed. 911 (1954).*

Imposing strict liability on an owner or controller of land for MSPA housing violations contravenes these notions. Under the holding being challenged here, even a landowner who directs his lessee not to house migrant agricultural workers on the property and who is assured by the lessee that no such workers are being housed on it is liable if the lessee is in fact allowing such workers to reside on it. The effect of a strict-liability standard is to impose on the landowner the duty constantly to patrol his land to ensure that no migrant agricultural worker resides on it.

Especially where large and remote parcels are concerned, this places an entirely unrealistic, if not impossible, burden on a landowner.

Requiring one to perform an essentially impossible task is exactly the type of fundamentally unfair government action that the Fifth Amendment prohibits. "Due process does not demand the impossible, but requires only the reasonable." *Dobkin v. Chapman, 269 N.Y.S.2d 49, 51, 25 A.D.2d 745 (1966), aff'd, 236 N.E.2d 451, 21 N.Y.2d 490, 289 N.Y.S.2d 161.*

CONCLUSION

WHEREFORE, the Court should grant the Petition for Writ of Certiorari and reject the holding of the court below that the MSPA imposes strict liability on a landowner or land controller for housing violations under it. In doing so, the court should specifically note in its decision that a landowner or land controller must be shown to know that migrant agricultural workers are being housed or are otherwise residing on his land for him to be held to have violated the MSPA's housing provisions.

Respectfully submitted,

NANCY N. MCDONOUGH
COUNSEL OF RECORD
CARL G. BORDEN
1601 Exposition Boulevard, FB3
Sacramento, California 95815
Telephone: (916) 924-4035
Attorneys for Amici Curiae